20

No. 04-623

Supreme Court, U.S.
FILED
JUL 20 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, Attorney General, *et al.*,

Petitioners,

v.

STATE OF OREGON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* SURVIVING FAMILY MEMBERS IN SUPPORT OF RESPONDENTS

ROBERT A. FREE
Counsel of Record
KATRIN E. FRANK
MACDONALD HOAGUE & BAYLESS
1500 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 622-1604

Attorneys for Amici Curiae Surviving Family Members

195453

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

I. STATEMENT OF *AMICI CURIAE* 1

II. SUMMARY OF ARGUMENT 5

III. THE ATTORNEY GENERAL'S CONCLUSION THAT OREGON'S LAW AUTHORIZES ILLEGITIMATE MEDICAL PRACTICES AND THREATENS THE PUBLIC HEALTH AND SAFETY IS ARBITRARY AND CAPRICIOUS 6

A. The Declarations of Survivors Whose Family Members Utilized Oregon's Law Demonstrate the Legitimate Public Interest and Public Health and Safety Concerns Served by the Death with Dignity Act. 7

B. The Declarations of Survivors Whose Family Members Could Not Utilize Oregon's Law Demonstrate the Legitimate Public Interest and Public Health and Safety Concerns Served by the Death with Dignity Act. 15

IV. CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984) 6

Northwest Natural Gas Co. v. Portland, 300 Ore. 291 (1985) 7

Washington v. Glucksberg, 521 U.S. 702 (1997) ... 1

Webster v. Reproductive Health Services, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989) 1

Statute:

21 U.S.C. § 823(f)(5) 7

Other Authorities:

Battin, M.P., *The Least Worst Death* (1994) 5, 7

Block, Susan D., *Patient's Request to Hasten Death*, 154 Archives Internal Med. 2039 (1994) 5

Burnell, George M., *Final Choices: To Live or to Die in an Age of Medical Technology* (1993) ... 5

Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984) 6

Compassion in Dying v. State of Washington, 79 F.3d 790 (9th Cir. 1996), rev'd. *Washington v. Glucksberg*, 521 U.S. 702 (1997) 1

Cited Authorities

Page

Farnsworth, C., *Vancouver AIDS Suicides Botched*, "N.Y. Times," June 14, 1994 ..... 5, 19

Fifth Annual Report on Oregon's Death with Dignity Act, Oregon Dept. of Human Services, Office of Disease Prevention and Epidemiology (Mar. 6, 2003) 14

Fourth Annual Report on Oregon's Death with Dignity Act, Dept. of Human Services, Oregon Health Div., Center for Disease Prevention and Epidemiology (Feb. 6, 2002) 14

Hedberg, Katrina, et al., *Five Years of Legal Physician-Assisted Suicide in Oregon*, 348 New Eng. J. Med. 961 (2003) 14

Jamison, Stephen, Ph.D., *Final Acts of Love: Families, Friends, and Assisted Dying* 169 (1995) 5, 24

Kolata, G., *AIDS Patients Seek Solace in Suicide But Many Risk Added Pain in Failure*, "N.Y. Times," June 14, 1994 ..... 5, 24

Kreimer, 44 Am. U. L. Rev. at 831 7

Lavery, James V., et al., *Origins of the Desire for Euthanasia and Assisted Suicide in People With HIV-1 or AIDS: A Qualitative Study*, LANCET, Vol. 358, No. 9279 (Aug. 4, 2001) 5

Cited Authorities

Page

Lavery, James V., et al., *Desire for Physician-Assisted Suicide: Requests for a Better Death?*, Commentary, LANCET, Vol. 358, No. 9729 (2001) 5

Mayo, D. and Gunderson, M., *Vitalism Revitalized: Vulnerable Populations, Prejudice, and Physician-Assisted Death*, The Hastings Center Report (July-Aug. 2002, pp. 14-21) 10

Nuland, Sherwin B., *How We Die: Reflections on Life's Final Chapter* (1994) 5

Oregon's Death With Dignity Act: The First Year's Experience, Dept. of Human Resources, Oregon Health Div., Center for Disease Prevention and Epidemiology (Feb. 18, 1999) 14

Oregon's Death With Dignity Act: The Second Year's Experience, Dept. of Human Services, Oregon Health Div., Center for Disease Prevention and Epidemiology (Feb. 23, 2000) 14

Oregon's Death With Dignity Act: Three Years of Legalized Physician-Assisted Suicide, Dept. of Human Services, Oregon Health Div., Center for Disease Prevention and Epidemiology (Feb. 22, 2001) 14

Quill, Timothy E., *Death and Dignity: Making Choices and Taking Charge* (1993) 5

Quill, Timothy E., *A Case of Individualized Decision-making*, 324 New Eng. J. Med. 691 (1991) 5

Cited Authorities

Page

Quill, Timothy E., *A Midwife Through The Dying Process* (1996) 5, 15, 23

Rachels, James, *The End of Life* (1986) 5

Rollin, Betty, *Last Wish* (1985) 5

Seventh Annual Report on Oregon's Death With Dignity Act, Oregon Dept. of Human Services, Office of Disease Prevention and Epidemiology (Mar. 10, 2005) 14

Shavelson, Lonny, *A Chosen Death: The Dying Confront Assisted Suicide* 677 (1995) 5, 19, 24

Singer, Peter, *Rethinking Life and Death* (1994) .. 5

Sixth Annual Report on Oregon's Death With Dignity Act, Oregon Dept. of Human Services, Office of Disease Prevention and Epidemiology (Mar. 10, 2004) 14

Solomon, A., *A Death of One's Own*, "The New Yorker," May 22, 1995 ..... 5, 19

Sullivan, Amy D. et al., *Legalized Physician-Assisted Suicide in Oregon 1998-2000*, 344 New Eng. J. Med. 605 (2001) 14

The New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context 40* (1994) .. 7

I. STATEMENT OF *AMICI CURIAE*

The *amici curiae* is composed of 17 distinct individuals – not an organization, a religious group, or a group of politicians.[1] The *amici* consists of six family members of individuals who experienced the positive aspects of physician-assisted dying under Oregon's Death with Dignity Act and eleven family members of individuals who experienced unnecessarily painful, traumatic deaths in the absence of physician-assisted dying. They submit this Brief in support of Plaintiffs' effort to preserve the rights afforded them by Oregon's Death with Dignity Act ("ODWDA").[2] The family members[3] are the voices of their deceased loved ones, describing for the Court the differing realities of what happens to families when a competent, terminally-ill person is granted or forbidden the choice of a hastened death. The individual experiences present the Court

---

[1] This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and their letters of consent are being lodged herewith.

[2] Consideration by the Court of statements similar to those filed herein are not without precedent. In *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989), an *amicus* brief filed with and considered by the U.S. Supreme Court, entitled "Women Who Have Had Abortions, et al.," included declarations by numerous women who had experienced legal and illegal abortions. More recently, the Ninth Circuit and the U.S. Supreme Court considered the arguments and declarations of surviving family members of individuals suffering from terminal illnesses who hastened their own deaths, some resulting in tragedy because physician assistance was unavailable. *See Compassion in Dying v. State of Washington*, 79 F.3d 790, 834 n. 126 (9th Cir. 1996); *Washington v. Glucksberg*, 521 U.S. 702 (1997). As in *Webster*, *Compassion in Dying*, and *Glucksberg*, the declarations filed here contain relevant first-hand information by persons intimately familiar with the issues presented to the Court.

[3] The term "family member" includes spouses, children, parents, a cousin, and one partner involved in a close personal relationship.

with the emotional resonance of dying with and without physician assistance to hasten the process. In each case, the dying person strongly desired to hasten his or her impending death. Contrary to the Attorney General's contention, none was depressed. Some were successful in hastening death without the benefit of the provisions for a humane death provided by the ODWDA – they used plastic bags or chose guns. Some died slowly but "naturally," in agony and without dignity. Those who could use the Oregon Act died when and how they wanted, under medical care, peacefully, with loved ones present. The perspective of persons who have had recent experience with this issue is relevant and necessary to the Court's proper and full consideration.

Declarations of the 17 family members were attached as appendices to their amici brief filed in the Ninth Circuit. The group includes the following who wanted to hasten their death but who did not have the benefit of Oregon's Death with Dignity Act:

- a widow whose husband of 25 years shot himself in their front yard in order to end his debilitating pain (App. 1) ("App." numbers reference the appendices filed by *amici* at the Ninth Circuit);
- a daughter whose father shot himself in bed, with his wife sleeping in the next room, rather than endure the nausea, vomiting, and excruciating pain resulting from his prostate cancer (App. 2);
- a daughter whose father asphyxiated himself with carbon monoxide poisoning from a charcoal grill in his bedroom, rather than suffer debilitating weakness and suffocation from end-stage emphysema (App. 3);
- a daughter whose father, dying of lung cancer, went down to his basement and shot himself with a 12-gauge shotgun, knowing it was illegal for his family members to assist in a suicide (App. 4)

- a daughter whose mother was wasted by cancer to a mere 60 pounds before she swallowed morphine (App. 5);
- a son whose mother suffered from ALS (Lou Gehrig's disease), losing the ability to walk, talk, breathe calmly, eat whole foods, and go to the bathroom and who felt this disease was worse than her experience in the Holocaust because she was so alone in her agony (App. 6);
- the life partner of a man who died a painful death from AIDS in 1995, who wanted to hasten his death but could not because it was not then legal in Oregon (the partner, who now has late-stage AIDS, has received medication to hasten his death under Oregon's law) (App. 7);
- a daughter whose mother was dying from throat cancer and suffering from grand mal seizures (causing her head to swell up like a balloon); the mother decided to stop hydration and food because it was the only method of hastening death in which her physician would assist (App. 8);
- a daughter whose father lay dying, diapered, moaning in pain and begging to die, while the doctor refused morphine because it could kill him (App. 9);
- a son who was criminally prosecuted for helping his 88-year old father, dying of cancer, hold a plastic bag over his head (App. 10); and
- a mother who struggled to medically assist her 26 year old daughter to die, because a doctor's help was not available (App 11).

In juxtaposition to these horrific deaths, the declarants also include six whose family members were able to utilize the Death with Dignity Act. This group includes:

- a daughter whose mother utilized the ODWDA to hasten her impending death and died surrounded by her five children, their spouses, her sister, her nephew, and her long-time personal physician, peacefully looking out over the Willamette River, in a room filled with love (App. 12);
- a husband whose wife of 25 years chose a hastened death rather than lingering under heavier and heavier doses of morphine treating her lung cancer pain and suffocating from the fluid in her lungs; with full support from her family, her clergyperson, her primary doctor, and other caregivers, she chose to hasten her death under the ODWDA (App. 13);
- a husband whose wife died under the ODWDA with her immediate family, a close friend, and two volunteers from Compassion in Dying of Oregon at her side – she died quickly and peacefully after saying goodbye to her loved ones, rather than continuing to suffer from pancreatic cancer, which had resulted in diabetes, physical debilitation, and moderately severe Parkinsonian-type tremors (App.14);
- a woman whose relative wrote two days before she died, which was the day before Thanksgiving: "On Thanksgiving, I hope everyone in my family will take time to feel thankful that I live in Oregon and have the means to escape this cancer before it gets any worse. I love you all." (App. 15);
- a widow whose husband died a few hours before obtaining the medication under the ODWDA that could end his life – who died in peace because he knew he finally had control over his life and death (App. 16);

- a daughter whose father died with his dignity in tact because he knew that under the ODWDA he had been approved to obtain medication to hasten his death (App. 17); and

The survivors are among a significant number of Americans who have witnessed loved ones die.[4] They give their names and sacrifice their privacy and that of their families to preserve their liberty and the liberty of others who are terminally ill and wish to die with dignity. With the combined personal experiences of this group, the *amici* has a profound interest in this litigation.

II. SUMMARY OF ARGUMENT

The *amici* support the District Court's and Court of Appeals' decision and counter the Attorney General's erroneous contention that permitting physicians to prescribe medication to hasten death, in certain limited situations, threatens the public

---

[4] Various sources recount experiences of hundreds of Americans similar to the experiences of the 18 representative family members. M. Battin, *The Least Worst Death* (1994); G. Burnell, *Final Choices: To Live or to Die in an Age of Medical Technology* (1993); C. Farnsworth, *Vancouver AIDS Suicides Botched*, N.Y. Times, June 14, 1994 at C12; S. Jamison, *Final Acts of Love* (1995); G. Kolata, *AIDS Patients Seek Solace in Suicide But Many Risk Added Pain in Failure*, N.Y. Times, June 14, 1994 at C I ; S. Nuland, *How We Die: Reflections on Life's Final Chapter* (1994); T. Quill, *Death and Dignity: Making Choices and Taking Charge* (1993); T. Quill, *A Midwife Through the Dying Process* (1996); J. Rachels, *The End of Life* (1986); B. Rollin, *Last Wish* (1985); L. Shavelson, *A Chosen Death: The Dying Confront Assisted Suicide* (1995); P. Singer, *Rethinking Life and Death* (1994); A. Solomon, *A Death of One's Own*, "The New Yorker," May 22, 1995 at 54; James V. Lavery et al., *Origins of the Desire for Euthanasia and Assisted Suicide in People With HIV-1 or AIDS: A Qualitative Study*, LANCET, Vol. 358, No. 9279 (Aug. 4, 2001); James V. Lavery et al., *Desire for Physician-Assisted Suicide: Requests for a Better Death?*, Commentary, LANCET, Vol. 358, No. 9729 (2001); Susan D. Block, *Patient's Request to Hasten Death*, 154 Archives Internal Med. 2039 (1994); Timothy Quill, *A Case of Individualized Decision-making*, 324 New Eng. J. Med. 691, 694 (1991).

health and safety. The experiences of the survivors recounting the positive aspects of having a physician assist in a hastened death demonstrate the important legitimate public interest and public health and safety concerns served by the Oregon law. The accounts of the survivors whose family members were deprived of the legal choice to obtain medical assistance to hasten death illustrate the tragic and enduring consequences of denying such freedom. The declarations reveal that Oregon's approach reduces the tragic consequences that flow from violent suicides, from failed attempts to commit suicide, from subjecting compassionate family members who assist in suicide to criminal liability, and from prolonging physical and emotional suffering of terminally-ill patients.

III. THE ATTORNEY GENERAL'S CONCLUSION THAT OREGON'S LAW AUTHORIZES ILLEGITIMATE MEDICAL PRACTICES AND THREATENS THE PUBLIC HEALTH AND SAFETY IS ARBITRARY AND CAPRICIOUS

The Courts below found that Congress did not intend the Controlled Substances Act ("CSA") to override a state's decision concerning what constitutes legitimate medical practices. *Amici* supports this conclusion. However, if this Court finds that the Attorney General does have authority under the CSA to define what constitutes legitimate medical practices, then the Attorney General's conclusion that the ODWDA authorizes illegitimate medical practices is an arbitrary and capricious conclusion. The Supreme Court has determined that agency interpretations, directories, and regulations are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

The Attorney General argues that the CSA authorizes him to prevent physicians from legally prescribing controlled substances if he determines that it would be against the **public interest** and threatening to the **public health and safety**. The

CSA does authorize the Attorney General, in making that public interest determination, to consider "[s]uch other conduct which may threaten the public health and safety." 21 U.S.C. § 823(f)(5). The crux of the Attorney General's position is that Oregon's law threatens the public health and safety.

The Attorney General's position is refuted by the declarations of the Surviving Family Members, is not supported by other rational argument, and is therefore arbitrary and capricious.

A. The Declarations of Survivors Whose Family Members Utilized Oregon's Law Demonstrate the Legitimate Public Interest and Public Health and Safety Concerns Served by the Death with Dignity Act.

The ODWDA serves the public interest in several important ways that are well within the police power of the state to promote. *Northwest Natural Gas Co. v. Portland*, 300 Ore. 291, 297 (1985) (noting that the state has police power to ensure health and safety of the public). The individual experiences of several of the *amici* surviving family members illustrate one or more of the following important contributions made by the ODWDA:

- **The ODWDA relieves severe and prolonged suffering of some dying patients who would prefer death:**[5]

---

[5] Despite new advances in pain treatment, an "irreducible core of patients are trapped in physical agony (if they are awake)." Kreimer, 44 Am. U.L. Rev. at 831, n.93. Pain cannot be controlled in 5% to 10% of cases. The New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context 40,* n. 18 (1994). Often, controlling pain sacrifices the patient's consciousness, which "is tantamount to causing death; the patient has no further conscious experience and thus can achieve no goods, experience no significant communication, satisfy no goals." M.P. Battin, *supra*, at 105.

- Alvin Davis describes his wife's choice to utilize the ODWDA:

  "It is possible to endure a great deal of pain and discomfort if one feels there is a purpose in doing so – that there may be a 'light at the end of the tunnel.' But when Norma learned from her oncologist early in July, 2001 that she had at most a few more weeks left to live, she decided she would prefer death on her own terms to a continuing, futile struggle ending in helplessness and misery. . . . [I]n those cases where the patient is suffering greatly and wishes to terminate his or her life before losing the ability to control what might happen, then the attempt by society to deny that right is, I believe, unspeakably cruel and arrogant." (App. 14)

- Robert Schwartz, suffering from late stage AIDS, has already obtained medication under the ODWDA rather than endure the pain suffered by his late partner:

  "During his final months [Roger] suffered from shortness of breath, full body pain, viral load of over one-million, CD4 count of less than 5 and general discomfort. He constantly said he had no relief from his medication. He also experienced temperature disregulation which caused him to be hot all of the time and he never found relief from it. . . . In my case I was diagnosed with HIV in the 1980s and I now have late stage AIDS. I completed the process under Oregon's Death with Dignity Act and now have the lethal dose of medication to hasten my death. I do not know if I will take the medication, but knowing I have it available affords me great comfort and ease of mind. I only wish Oregon's law was available to

Roger. He may not have died the tragic death he did if he had the legal option to hasten his death." (App. 7)

- **The ODWDA promotes public safety and order by averting violent, ghastly, and often unsuccessful efforts to hasten impending death by patients who previously could not make use of the ODWDA:**

  - Tania Bloom writes of her father's death by gunshot:

    "My son-in-law had the unfortunate and unpleasant task of cleaning my father's splattered brains off the basement walls. This memory lives with him to this day. . . . If Oregon's law had been in effect in Washington my father's tragic and violent death could have been avoided." (App. 4)

  - Dr. Marcia Angell, M.D., a lecturer at Harvard, writes about her father's gunshot death:

    "If physician-assisted-dying had been available to my father, as it is to the people of Oregon, I have no doubt that he would have chosen a less violent and lonely death. My mother could have been brought around to accepting his decision, death could have been peaceful, and his family could have been with him. If he knew he had the option to get help in ending his life at any time in the future, he probably would have chosen to live longer. That night would not have been his last chance." (App. 2)

- **The ODWDA provides safeguards that ensure a decision to hasten death is made knowingly, voluntarily, and with proper medical advice and assistance after due consideration[6]:**
  - Scott Rice was involved in his wife's utilization of the ODWDA in 2000:

    "She went through an extensive screening process over a two-week period which involved her having three sessions with her primary doctor, an interview with the chief of ethics of our HMO, and the review by a second doctor outside the HMO. There was no doubt from anyone that she was competent and not depressed. Her treatment options were discussed and reviewed with her over and over again. She was given assistance with hospice care and pain management. We were encouraged to share her decision with our family members, which we did. We also took time to discuss her desires with her clergy person. After each meeting and discussion Colleen's resolve to hasten her death strengthened." (App. 13)

- **The ODWDA advances the public interest in protecting families by relieving family members of the pressure to assist their loved ones to hasten death illegally:**
  - Julie McMurchie writes about her mother, who utilized the ODWDA:

[6] *See* D. Mayo and M. Gunderson, *Vitalism Revitalized: Vulnerable Populations, Prejudice, and Physician-Assisted Death,* The Hastings Center Report (July-Aug. 2002, pp. 14-21). This paper refutes the argument that ODWDA is not in the best interest of people with disabilities, as posited by organizations such as Not Dead Yet. The risk of coercion is already present in states other than Oregon and arguments against ODWDA deny that people with disabilities are capable of choosing intelligently and authentically.

"I am proud to have supported my mother in the final deliberate act she had in her life... Oregon's law gave my family and me something special and it allowed my mother to die with dignity and grace." (App. 12)

- Patty Rosen helped her daughter die in Oregon, before the ODWDA took effect:

  "If Oregon's law had been in effect at the time of my daughter's death she would not have had to endure the long, anguishing months of pain and suffering caused by her cancer. She would not have had to add to her pain by worrying about whether I might be punished for assisting her. I too would not have had to agonize for months over whether to assist her. If Oregon's law had been in effect in 1986 my daughter's dying would have been free from fear. I know in my heart she would have chosen to use Oregon's law and our family would have been at her bedside sharing all our love without fear of prosecution." (App. 11)

- **The ODWDA protects the dignity, privacy, and autonomy of patients:**
  - Scott Rice writes:

    "If my wife had not been able to access her right to die with dignity under the law because her physicians feared they would be prosecuted, her rights would have been taken away from her without recourse and she would have died a terrible death – one that she did not want to experience and that no one should have to experience. She did not want that for herself or for us who would have had to stand by watching her drown in her own fluid." (App. 13)

- Julie McMurchie writes about her mother's decision to utilize the ODWDA:

  "She often said that she feared the loss of control over her life and that when she started the process to use Oregon's law she found a great deal of comfort and ease of mind. She would often talk about her sister's death, which was an agonizingly long and painful death because her sister, who was unable to use Oregon's law because she was not a resident of Oregon. My mother vowed she would not go through the same dying process as did her sister." (App. 12)

- Beverly Heitz describes the benefits of the ODWDA even though her husband died a few hours before obtaining the prescribed medication:

  "While I wish Arnie had started the process sooner so that he could fulfill his wish, I am convinced Arnie was helped tremendously just knowing assisted suicide was an option for him. Arnie's daughter also saw a change in her father after he knew a prescription would be written for him under the law. He talked more about his death and he asked her to take care of me. He told his daughter that he knew he didn't have control over anything else anymore, but at least he had control over his death. Others told me that after Arnie knew he would get his prescription he found peace of mind because he wanted control over his life and death. . . . Arnie's decision to use the law profoundly affected my life. Arnie was a very special person and the bravest man I think God ever put on this earth. He taught me a lot about acceptance and a lot about 'letting go,' although I'm still stumbling through all of it." (App. 16)

- Sue Parks Hilden discusses her father's utilization of the ODWDA:

  "He often told me that he found great comfort going through the process of obtaining the medication. He said it was very useful and gave him ease of mind. It always gave his family, in particular me, time with him that I might not have otherwise have had. He almost completed the process of getting the medication before he died. He did not have the medication in his possession on the day he died, but he died peacefully at home surrounded by his family." (App. 17)

- Laura Boessenroth describes what her relative told her about her decision to utilize the ODWDA:

  "She told me she was very relieved to know that the law would be available to her because, now that her death was eminent. She told me she was relieved about her decision to consider using Oregon's law to facilitate a dignified end to her agony. She was ecstatic to be able to have present medical personnel present at her death who would monitor the process, offer comfort and their expertise. She was 'happy' with her plan, and because her life had been reduced to few truly happy moments, she considered the opportunity to have this small amount of control and peace of mind to be a gift to her and all who loved her." (App. 15)

Defendant has failed to provide *any* evidence of how the physicians or decedents who since 1997 utilized and complied with Oregon's law have threatened the public health and safety. There is no evidence that someone's hastened death was not voluntary or was under duress. There is no evidence that someone's hastened death occurred when the underlying illness was not terminal. There is no evidence that someone hastened

death because he or she was depressed or lacked knowledge about ameliorating pain. To the contrary, the declarations of surviving family members of patients who utilized Oregon's law are evidence that doctors and patients who complied with Oregon's law were able to achieve desired peaceful and dignified deaths, immeasurably helping both the dying persons and their family members and *hurting no one.*[7]

It will benefit all Americans to permit Oregon to continue experimenting with this vital question facing every human: how to die in peace and dignity. Citizens may disagree about the issue, but that does not mean that Oregon's position threatens the public health and safety.

---

[7] *See Oregon's Death With Dignity Act: The First Year's Experience*, Dept. of Human Services, Oregon Health Div., Center for Disease Prevention and Epidemiology (Feb. 18, 1999); *Oregon's Death With Dignity Act: The Second Year's Experience*, Dept. of Human Services, Oregon Health Div., Center for Disease Prevention and Epidemiology (Feb. 23, 2000); *Oregon's Death With Dignity Act: Three Years of Legalized Physician-Assisted Suicide*, Dept. of Human Services, Oregon Health Div., Center for Disease Prevention and Epidemiology (Feb. 22, 2001); *Fourth Annual Report on Oregon's Death with Dignity Act*, Dept. of Human Services, Oregon Health Div., Center for Disease Prevention and Epidemiology (Feb. 6, 2002); *see also* Amy D. Sullivan et al., *Legalized Physician-Assisted Suicide in Oregon 1998-2000*, 344 New Eng. J. Med. 605 (2001). *Fifth Annual Report on Oregon's Death with Dignity Act*, Oregon Dept. of Human Services, Office of Disease Prevention and Epidemiology (Mar. 6, 2003); *Sixth Annual Report on Oregon's Death with Dignity Act*, Oregon Dept. of Human Services, Office of Disease Prevention and Epidemiology (Mar. 10, 2004); *Seventh Annual Report on Oregon's Death with Dignity Act*, Oregon Dept. of Human Services, Office of Disease Prevention and Epidemiology (Mar. 10, 2005); *see also* Katrina Hedberg et al., *Five Years of Legal Physician-Assisted Suicide in Oregon*, 348 New Eng. J. Med. 961 (2003).

B. The Declarations of Survivors Whose Family Members Could Not Utilize Oregon's Law Demonstrate the Legitimate Public Interest and Public Health and Safety Concerns Served by the Death with Dignity Act.

Several declarations of *amici* establish that the Oregon Act works as intended and that prior to its enactment real people suffered real harm that could not be alleviated by medication or therapy. The individual experiences of surviving family members illustrate one or more of the following harms to the public interest that the position of the United States would inflict by effectively reinstating the law in existence before the passage of Oregon's Death with Dignity Act:

- **Prior law resulted in untold pain, agony, and suffering for some dying patients who would prefer death; a slow, debilitating death is often accompanied by a profound loss of dignity and sense of self.**[8]

- Stewart Florsheim describes his mother's condition shortly before her death:

  "During the course of the disease [ALS/Lou Gehrig's disease], my mother suffered greatly. Over a short period of time, she lost the ability to walk and to swallow whole foods. Breathing became more and more difficult, as the muscles in her chest weakened. She used a Bi-Pap machine to assist her breathing. When that no longer was effective, the doctor recommended that she stop using the machine, and step up the dose of morphine to calm her breathing. At the end, she

---

[8] T. Quill, *A Midwife Through the Dying Process* (1996) at 197 ("Often, doctors undermedicate dying patients' pain or shortness of breath because of the legal risks [both exaggerated and real] associated with overmedicating.")

started to lose her ability to talk. She became increasingly anxious because she felt as if she were suffocating. Because eating became a chore, she lost interest in food and became thin as a rail. That – in combination with the morphine – made her so constipated that her nurse had to come in many times to evacuate her bowels by hand. It was so painful to her that she screamed out... Toward the end of her life, she said that having this disease was worse than going through the Holocaust because she was alone in her agony. No one could really know how much she suffered." (App. 6)

- Leanne Gallison describes her mother's lung cancer:

  "Sharp pains developed in her chest and her spine. Terrifying episodes of shortness of breath increased. Chemotherapy made her horribly ill, nauseated around the clock. At this time, she began to have seizures. Tumors were discovered in her brain. Radiation was added to treat her brain but this resulted in my mother becoming completely flattened with no stamina, no energy... On her bad days, she would ask me, 'How am I going to get out of here?' And, 'I want to go, and I want to go NOW!' She weighed about 60 pounds." (App. 5)

- Linda Kilcrease and her four siblings watched their mother die from throat cancer:

  "We watched as her head blew up like a balloon, forcing her eyes closed, when the blood first began to back-up and could not drain. We watched as her heart beat so hard and fast, nearly ripping through her chest, trying to get blood into her head. The hospital staff gave us heartbeat and

blood pressure monitors, and we watched the wild fluctuations in vital statistics. We learned how to position Mom's head so her heart would calm down. We watched her change from a robust woman into a shriveled-up skeleton... It was torture for everyone, but especially for Mom... Those who say that pain medication and psychiatric help is all that is needed to help someone facing death have it all wrong. Neither would be of any use to my mother." (App. 8)

- Gail Bereny could not obtain help for her father's pain:

  "My father's pain was severe and unrelenting. Almost worse was his loss of dignity. As my father lay dying he was completely lucid and aware that he was diapered, weak, and needed help for even basic tasks. Dignity was very important to him, and the fact that he knew what was going on was terrible. He moaned in pain, begging to die. I called the doctor's office, crying, begging him to relieve Dad's pain. He refused, saying morphine would kill him." (App. 9)

- **Prior law caused some patients to choose a violent, often gruesome manner of hastening death; these acts are generally committed alone, without family present.**

  - Patsy McGeorge was in the house when her husband shot himself outside:

    "Mac did not want to be a sedated vegetable. Following an almost 24 hour drugged stupor, he decided that was not the answer. . . . After a brief and very personal conversation, he gave me the note he had carried for months, attesting to the fact that his decision was his own; kissed me

goodbye; went into the front yard; put a shotgun in his mouth and pulled the trigger. Since a peaceful death was not available, this was his way to insure death with the dignity he valued so highly. Two months later I was emotionally wrenched by finding a portion of his upper dental plate 50 feet from the site of his death – a testament to the violent alternative he was forced to choose... I wish I could have been with him at the end, but he said no, 'it will be messy.' (App. 1)

- Dr. Angell describes her father's suicide:

  "At the time my father killed himself, he was living with my mother near Orlando, Florida. My mother was a housewife who had always been dependent on him. Now it was the other way around. The day before his death, he fell while walking from the bed to the bathroom. My mother was unable to lift him, so she called the emergency medical technicians. They lifted him onto the bed and said they would return the next day to take him to the hospital to make certain he had not fractured a bone. I believe he decided to kill himself that night because it might be his last chance to do it. He had always kept a pistol in his bedside table. If he went to the hospital the next day, he would be without it and he might never again have the option of ending his own life. My mother was sleeping in the next room, and had to bear the shock of finding his body. If he had told her of his intentions, she would have stopped him, as she later told me. So he did not tell her. Later, I could see from the trajectory of the bullet that he had turned in such a way that the bullet could not have gone through the wall and harmed her." (App. 2)

- Leslie Ghan discovered her father after his suicide:

  "He discussed his desire to hasten his death with me on several occasions and I did not know how to advise him. Starving himself did not seem like an easy or peaceful option. He believed that his doctor would not assist him in any way. My father decided to take matters into his own hands. He went out with great difficulty and with his oxygen and bought a charcoal grill and charcoal. He assembled the grill and put it in his bedroom. Then he sealed the windows and door and lit the charcoal and lay down on the bed. I knew nothing about this plan. I went to his home the next day because he did not answer his phone and found a note on the table that said I should not go into the bedroom. I was shaking and crying and called the police. The coroner said he died of carbon monoxide poisoning and that it was probably a peaceful death. I will never forget that he had to do this all alone, that I couldn't be there." (App. 3)

- **Prior law resulted in the failure of some attempts to hasten death, due to the absence of trained medical care – sometimes leaving the patient in worse condition than before the attempt.** [9]

---

[9] L. Shavelson, *supra*, at 126 ("From safer sleeping pills to air bags in cars, science had made killing yourself without professional help a tremendously difficult task – and a mission fraught with the potential for ghastly errors.") *See* C. Farnsworth, *Vancouver AIDS Suicides Botched*, "N.Y. Times," June 14, 1994 at C12 (of 34 assisted suicides studied in Vancouver, B.C. [which, similar to the U.S., bans physician assisted suicide], half were "botched, increasing suffering when the aim was to alleviate it."); Andrew Solomon, *A Death of One's Own*, "The New Yorker," May 22, 1995, at 57

I heard of suicides as grueling as the diseases they were meant

(Cont'd)

- **Prior law resulted in some family members feeling compelled to assist their loved ones to hasten death, with concomitant fear and hiding, guilt, and occasional criminal investigation and prosecution.**
  - William Meyer describes his prosecution for his involvement in his father's death in Connecticut:

    "After my father and I met with my father's doctor of 25 years, my father decided that he would take sleeping pills and place a plastic bag over his head, as described in the book Final Exit. My father's first attempt at this failed when his reflex action, which comes of feeling suffocated, caused him to pull off the plastic bag. Since my father wanted to protect me from getting into trouble with the law, he instructed me to leave the house immediately after he placed the plastic bag over his head. He was alone. The next morning, when I returned, I found him awake and distressed that he was still alive. He pleaded with me to do everything possible to end his life that evening. This was undoubtedly the most difficult day of my life. He consulted with his doctor and was advised that I could hold my father's hands so the reflex action would not remove the plastic bag. My father and I followed this procedure and he was able to end his life. . . . I was arrested and charged by the police with second degree

---

(Cont'd)

to terminate. In some cases, irreplaceable pills were regurgitated. "My husband had to just eat his vomit," one woman said. "He was that determined. But then he threw up again. We waited about an hour; then he downed it all again and I put a plastic bag over his head so he would suffocate before he got sick, and he finally died. He'd been through so much, and that whole disgusting, humiliating business was the living end."

manslaughter. If convicted, I faced ten years in prison. At a hearing in December 1994, before a Superior Court judge in Hartford, Connecticut, two ministers and several friends spoke on my behalf. Numerous people, including eleven ministers and eighteen doctors and nurses wrote to the judge to support me. Even though the District Attorney pleaded that my case go to trial, the judge stated that although I had broken the law, I was following my father's wishes. I was given two years "accelerated rehabilitation" and after two years, all charges were dropped with no record." (App. 10)

- Patty Rosen describes her agony being present at her daughter's suicide in Oregon before the ODWDA took effect:

  "Jody, bedridden from the inexorable growth of the [bone] cancer, felt trapped in her body that would barely work. She slept with the aid of medication almost 23 hours each day. Even in sleep her face reflected the pain she was constantly enduring. She was also losing her sight, experienced excruciating pain from total bowel obstruction, and shuddered in pain whenever someone touched her because now there were also tumors, just below the surface of her skin, that inflamed her nerves and caused even more severe pain... My daughter was dying. She knew it and she was ready to die sooner than later. She was rational, calm, and ready to die. However, in 1986 it was illegal for anyone, in any state in the United States, to assist in hastening a death. Jody said to me that she 'should be able to talk with [her] doctor and plan this, not ask [you].' She said to me, 'Mom, what if you go to prison? What will happen to you?' This concern and worry

made her small face, already marred with the sunken eyes of the near dead, take on an incredibly distressed, painful appearance. Her trust and faith in me made me humble and I vowed I would not let her continue to suffer merely because of what might happen to me if I assisted her. . . . When it was time for Jody to hasten her death she calmly and determinedly swallowed all of the medication we had gathered, took a few sips of water, kissed me, and said, 'See you later Mom.' She then closed her eyes and went to sleep. At that moment I went into a pure panic. I thought, 'What if I failed? What if she regains consciousness?' If this didn't work she might even be worse off than before and an even more consequence; I would have failed her. I then gave her all the I.V. medications I could pump into her stilled body. I moaned, sobbed, prayed, and kept pushing the drugs into her body. I was as desperate as I had ever been in my life. . . . The silence came ten hours after we had started the process. My daughter finally stopped breathing. Her year and a half of pain, suffering, rage, and hopelessness had ended. I crawled into her bed, gathered her still body into my arms; at last able to hold my daughter without hurting her. I stroked her hair while rocking her gently. I was able to surrender to my own grief knowing that my young, brave and wise daughter, Jody Lynn Grape, age 26, found her peace on October 30, 1986 at 1:30 p.m." (App. 11)

- Prior law resulted in suffering, guilt, anger, and remorse for some surviving family members.
  - Gail Bereny writes about her father's slow, "natural" death:

    "I felt very guilty then, and feel guilty now, about Dad's terrible death. I feel guilty that he died in so much pain and with no dignity left. The doctor had the means to give him a gentle, painless death. I have been left with frustration, anger, regret, and sadness. He had been a very good father." (App. 9)

  - Leanne Gallison describes her feelings about the end of her mother's life:

    "My mother's illness was awful for me because I was very close to her. I had nightmares for weeks prior to her death. She was so miserable and in a state that she never wanted to find herself in. In spite of my being a nurse, I felt helpless." (App. 5)

  - Patsy McGeorge describes her current reaction to her husband's suicide in their front yard several years ago:

    "It has been nearly six years since that February morning, but I can remember those events as clearly as though they occurred only yesterday. And in my mind's ear, I can still hear the sound of that shotgun blast, and with it the gut-wrenching realization of what had just happened. I suspect I always will." (App. 1)

IV. CONCLUSION

As the experiences of the 17 *amici* surviving family members show, many people are determined to control the dying process when faced with a debilitating terminal illness. Neither this Court nor the Attorney General can stop the terminally ill from hastening their deaths – it does happen and will continue to happen as long as human beings have free will. [10] The real

---

[10] Timothy E. Quill, M.D., *A Midwife Through The Dying Process*, at 199 ("Doctors, patients, and their families are engaged in negotiated

(Cont'd)

question is *how* hastened dying for the adult terminally ill should occur: Will it be acts of violence taken alone? Will it be untrained family members compelled to assist in secrecy and fear? [11] Or will it be medically trained personnel evaluating and assisting, in the open, according to legal guidelines? [12] *Amici* urge the Court to recognize that the legal guidelines established in Oregon promote the public health and safety and serve a legitimate public interest, not only of citizens of Oregon but of the United States.

Come Death

walk toward me

in your flower-printed silk
and fine mossy velvet or
in your impeccably tailored
black suit

come in all your perfection

extending your hand
and saying your name

(Cont'd)

deaths every day in every community in the United States.") With AIDS, the number of end-of-life suicides has increased dramatically. G. Kolata, *AIDS Patients Seek Solace in Suicide But Many Risk Added Pain in Failure,* "N.Y. Times," June 14, 1994, at C1.

[11] Stephen Jamison, Ph.D., *Final Acts of Love: Families, Friends, and Assisted Dying* 169(1995) ("Until the laws change, secrecy will remain one of the most dominant features of assisted death.").

[12] *Ibid.* 5 ("This illegal assistance . . . goes on without guidelines, safeguards, psychological counseling or evaluations, required consultation with specialists, referrals to hospice, or even mandatory discussion of alternatives."). Moreover, sometimes family members are not those assisting. "In the absence of legally available aid from physicians, abuses are occurring at the hands of unregulated freelance euthanasists, illegal suppliers meeting an otherwise unmet demand." Lonny Shavelson, *A Chosen Death: The Dying Confront Assisted Suicide* 677 (1995).

draw me toward you as my close friends do
hold me elegantly still

in dance position
then waltz me away

glancing over your shoulder once

and with the smallest gesture
let them know how much
I liked to dance

(Written by Norma Davis, who died on July 16, 2001 from a self-administered dose of barbiturates prescribed under Oregon's Death with Dignity Act)

Respectfully submitted,

ROBERT A. FREE
Counsel of Record
KATRIN E. FRANK
MACDONALD HOAGUE & BAYLESS
1500 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 622-1604

Attorneys for Amici Curiae
Surviving Family Members